# Department of Law Monthly Report

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## Office of the Attorney General

### CONFERENCE OF WESTERN ATTORNEYS GENERAL ISSUES REPORT ON THE OPERATIONS OF THE DEPARTMENT OF LAW

At the invitation of Attorney General Gregg Renkes, the Conference of Western Attorneys General (CWAG) assembled a team of experienced legal administrators to conduct a week-long review of the operations of the Department of Law. The team, headed up by CWAG Executive Director Tom Gede, conducted some 100 interviews in Anchorage, Fairbanks, and Juneau during the period of March 3 through March 7. They interviewed a wide range of departmental staff, client agency representatives, legislators, and judges. The team also reviewed organizational charts, budget documents, and departmental policies and procedures. In May, the team issued a comprehensive 51-page report, which is now available on the Department of Law's web page at www.law.state.ak.us. The report includes comments and recommendations on virtually every aspect of the department's operations and will be an important tool for us as we work to further improve the quality of legal services we provide to state government.

## Collections & Support

### COLLECTIONS ACTIVITY

In May, the collections unit opened two OSHA and three civil collection files and closed one APOC collection file. On the criminal side, the unit sent 34 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues. We requested 45 refunds to be issued to defendants or other agencies, and ten refunds were issued.

With respect to victim restitution, the unit opened 120 criminal and 17 juvenile restitution cases for collection. We returned eight judgments to the issuing courts or Division of Juvenile Justice due to insufficient information. Initial notices were sent to 175 recipients. Forty-five judgments were paid in full and satisfactions of judgment were filed. Our office received payments totaling $44,761.12 toward criminal restitution judgments and payments totaling $19,270.51 toward juvenile restitution judgments this month. We requested 205 disbursement checks and issued 152 checks to recipients.

### CUSTODIAL PARENT'S DEATH DOES NOT TERMINATE SUPPORT OBLIGATION

AAG Diane Wendlandt obtained a favorable result from the superior court in the *Terry Johnson* case.

The parents, Terry and Marie Johnson, were divorced in Alaska in 1999. The court awarded custody of the parties' children to Marie and ordered Terry to pay support of $328.48 per month. Several months later, in July 1999, Marie died, and Mary Tillett was appointed guardian and conservator for the children by an Oregon court. CSED changed the payee on the case to Mary and continued to collect support from Terry under the existing order.

Several years later, in March 2003, Terry filed a motion asking the court to declare that the child support order from the divorce terminated when Marie died. CSED opposed Terry's motion, arguing that Terry's support obligation was owed to the child (not to the custodial parent) and, thus, survived Marie's death. Because the support order remained in effect, we argued CSED acted properly when it changed the payee and continued to collect support from Terry.

Superior Court Judge Brown agreed with our analysis. The court held that "the death of the custodial parent in a child support order is not among the events which terminate the order as a matter of law." At most, the court noted, Marie's death could constitute a material change in circumstances which might justify a prospective modification from the date of the motion forward.

### TRO GRANTED IN CHILD SUPPORT CASE

In the *Roland James* case, AAG Pamela Hartnell obtained a temporary restraining order preventing the obligor, Roland James, from withdrawing pension funds while a request for a qualified domestic relations order was pending. Mr. James has three cases with different custodial parents. The arrears owed on these three cases total more than $130,000.

Mr. James will become eligible to withdraw money from his pension plan in July 2003. Therefore, CSED sent the files to law to obtain qualified domestic relations orders ("QDRO"), which will allow the attachment of the pension funds for payment of child support. Ms. Hartnell prepared and filed the petitions for QDRO.

Because Mr. James would become eligible to withdraw the funds in less than two months, Ms. Hartnell also asked the court for both a temporary restraining order and preliminary injunction to prevent Mr. James from

withdrawing the pension funds before the court could issue the QDRO orders. The court granted the temporary restraining order and set a hearing for the preliminary injunction in early June.

## FAVORABLE RESULT IN THE AMUNDSON PATERNITY ACTION

This case involved a child born to a married woman receiving public assistance for the child.

In 1997, Kirk Amundson arranged for genetic testing that showed he was the child's biological father. Five years later, the mother's husband asked CSED to disestablish his paternity based on the 1997 test. In April 2002, CSED granted that request, but ruled that the husband remained responsible for the child through May 1997.

CSED then filed a paternity action against Amundson. In answer, Amundson admitted paternity but argued that CSED should be estopped from collecting from him any reimbursement for public assistance benefits paid before the paternity complaint was filed. Amundson alleged that CSED had assured him that because the child was born to a married woman he would not be responsible for supporting the child and would never have child support arrears.

Judge Stephens ruled that there were disputed issues of fact precluding the court from ruling on the estoppel claim as a matter of law. In subsequent discovery, Amundson identified telephone calls in January 1997 and April 1997 as the instances in which CSED had made the assertions supporting his estoppel claim. At trial, both Amundson and a friend who spoke with CSED on his behalf also testified regarding telephone conversations with CSED in July 1997 and a conversation in October 1997. At trial, Amundson stated that he had relied on representations made by CSED in October 1997.

In May, the court granted judgment to CSED on the estoppel claim. The court assumed arguendo that CSED made the claimed statements in October 1997, but found that Amundson's testimony that he had relied on these statements was directly contradicted by his answers to discovery in which he identified only January 1997 and April 1997 conversations. The court also found that Amundson's claim of reliance was inconsistent with his testimony in a private custody proceeding in which he had testified that he had paid thousands of dollars of child support directly to the child's mother after obtaining the genetic test results. In light of these and other inconsistencies, the court found that Amundson had failed to prove reasonable reliance by a preponderance of the evidence. The court thus ruled that CSED is not estopped from collecting back child support from Amundson as reimbursement for public assistance benefits. AAG Lea Filippi handled this case.

## PERSONNEL NEWS

Carole Fisher joined the collections unit as an Administrative Clerk II. Carole is a welcome addition to the section.

# Commercial & Fair Business Section

## ACCUSATIONS AGAINST TWO LIQUOR LICENSE HOLDERS

An accusation was filed against Riverside Properties, Inc, the holder of a beverage dispensary license doing business as The Riverside House in Soldotna, for violations of Title 4 (Alcoholic Beverages). The accusation alleged illegal gambling conducted on the licensed premises consisting of weekly football pools and a Super Bowl pool during the fall and winter of 2002. The board and the

Riverside House reached an informal settlement of the accusation at the June 26, 2003 board meeting. The board imposed a $10,000 fine, with $5,000 suspended contingent on no further violations of Title 4 within two years.

An accusation was also filed against the American Legion Post #13, the holder of a club license in Sitka. Allegations against the American Legion Post included significant drug activity on the premises, including the sale of narcotics to an undercover police agent on more than one occasion by employees of the Post. This matter has not yet been set for hearing and the parties are conducting settlement negotiation.

AAG Linda Kesterson assisted the staff of the ABC Board in drafting these two accusations.

## Human Services

### SUPREME COURT DECIDES THREE CHILD IN NEED OF AID CASES

In a published opinion (*G.C. v. State, DFYS*, 67 P. 3d 648 (Alaska 2003)), the Alaska Supreme Court affirmed the termination of a father's parental rights to his child. The court rejected the father's claim that he had wanted to play an active role in his child's upbringing but that the child's mother had prevented him from doing so. The court cited the complete lack of contact between the father and his child over the ten years of the child's life, the father's failure to even attempt to provide financial or emotional support to his son, his failure to try to gain custody of the child, and his failure to develop any type of a relationship with him. The court upheld the trial court's finding that the father had abandoned the child, concluding that the father's actions were conscious and calculated, whatever his reasons were for making the decisions he did. The court also held that when a parent is incarcerated the services offered to the parent by the correctional institution fulfill DFYS' duty to make reunification efforts for the parent. As long as services are offered by the institution, the court held, the agency is under no duty to seek out additional community-based programs for the parent. AAG Lance Nelson of the Natural Resources section kindly handled this appeal when Human Services was in a bit of a crunch.

The court also upheld terminations in a pair of unpublished Memorandum Opinion and Judgments. The first, *Damon R. v. State, DFYS*, #S-10756, May 21, 2003, involved a father who claimed that DFYS failed to make sufficient efforts to reunify him with his two children. However, the court found the agency's efforts sufficient in light of the father's belated and half-hearted participation. The court found that the father's repeated incarcerations did not provide him with a sufficient excuse as to why he did not complete the many programs that were offered to him. The father also argued that the superior court's findings and conclusions were defective. He argued that the trial court erred when it adopted verbatim the proposed findings and conclusions drafted by the state, without making its own "autonomous" oral finding that termination of the father's rights was in the children's best interests. While that argument might have some sway in another jurisdiction, our supreme court had no trouble dismissing it, in light of Alaska Civil Rule 78. AAG Mike Hotchkin briefed the appeal for the state.

The other MO&J, *Craig F. v. State, DFYS*, #S-10622, May 14, 2003, was an Indian Child Welfare Act (ICWA) case.

## Legislation/Regulations

### LEGISLATURE ADJOURNS; SEVERAL MAJOR DEPARTMENT OF LAW BILLS PASS THIS SESSION

During May 2003, the Legislative and Regulation section provided legal assistance in drafting amendments and finalizing bill reviews for the governor's consideration.

The Department of Law's own proposals were received quite favorably by the legislature - with the passage of important improvements in tort immunity, equity in workers' compensation coverage for state-employed seamen, and to ensure that the attorney general can bring claims on behalf of consumers more efficiently in certain antitrust cases.

The section also completed reviews of several regulations projects, including regulations with respect to fish and game, occupational licensing, collective negotiations between physicians and health benefit plans, Medicaid payments to "disproportionate share" hospitals, Alcoholic Beverage Control Board matters, group health plans and coordination of benefits for certain state employees, and water quality standards. The section completed technical revisor's changes to conform existing regulations to changes resulting from Executive Orders 104 and 107.

The section welcomes Dave Marquez as supervising attorney effective June 3, 2003.

## Labor & State Affairs

### JURY REJECTS RETALIATION CLAIMS

A federal court jury rejected an employee's claims that she suffered retaliation for filing discrimination complaints. The employee, who continues to work for the Department of Natural Resources, claimed that the department retaliated against her by failing to appeal the reclassification of her position in 1996 and by placing her on probation when the reclassification took effect. The department explained to the employee and the jury that it did not appeal the reclassification because the reclassification increased the assigned salary range for the employee's position and seemed appropriate. The department also explained that it had placed on probation all employees whose positions were reclassified to job classes at higher salary ranges. The jury rejected the employee's contention that the department's explanations were false and reached a verdict in favor of the department. AAG Dave Jones represented the department in this matter.

## Natural Resources

### NATIVE ALLOTMENT APPLICATION REJECTED

In a victory for the United States and the State of Alaska, the Interior Board of Land Appeals (IBLA) has affirmed that an application for an allotment on Yukon Island (across the bay from Homer) was not supported by the necessary five years of substantial use and occupancy. The IBLA also rejected the applicant's challenge that the regulations governing allotments were improperly applied retroactively. The state has a deep interest in the parcel of land at issue because it contains an archeological site that has been recognized as a National Historic Landmark. With the rejection of the allotment application, the parcel will remain in public ownership.

In June of 1998, the state participated as an intervenor in a week long hearing contesting the native allotment application filed by Violet Mack. Along with contesting the merits of the

applicant's claim to the allotment, the state presented evidence to support its contention that even if the applicant qualified for the allotment, the BLM should exercise its discretion to reject or condition any approval of the allotment, to avoid or minimize adverse effects on the historic archeological site. After briefing by the parties, the Administrative Law Judge (ALJ) rendered a decision in May of 1999 finding that the native allotment application must be rejected for failure to establish the necessary supporting use. The IBLA's decision affirming the ALJ's findings concludes a contest action that it had called for nearly twenty years ago, after the state successfully appealed the initial BLM determination approving the application. AAG Laura Bottger represented the state before the IBLA.

## SUBSISTENCE PERMIT APPLICATION SCORING FACTOR FOUND UNCONSTITUTIONAL

Superior Court Judge Sen Tan issued a summary judgment order in *Manning v. Dep't of Fish and Game* on May 11, 2003. The lawsuit challenged three regulatory factors used by the Board of Game to score Tier II subsistence hunting applications. Under its statutory mandate to award permits based upon applicants' abilities to obtain food if they are not able to participate in the hunt in question, the board measured (1) the availability of alternative sources of game, (2) the cost of store-bought food, and (3) the cost of gasoline (used to access other sources of game) to each applicant.

To gather this data, the board asked each applicant to list the species and number of animals harvested over the previous five years and the communities in which most store-bought gasoline and food were purchased. The "alternative sources of game" factor was scored by use of a percentage, comparing animals harvested from the Tier II population to all animals harvested. Cost of food and gas were scored based on annual Cooperative Extension Services' cost-of-living studies for the communities indicated. However, for each of the three factors, the applicant's score was limited by a community-based cap in order to prevent scores based on untruthful or objectively unreasonable answers. So, applicants could score less than, but not more than, their neighbors. Thus, there was no reward for claiming that one buys food or gasoline at a place where it is more expensive than the applicant's home community, and people could not receive more points for claiming that they had fewer alternative big game options than are consistently relied upon by the community at large, within the local area. Mr. Manning's challenge was that application of these standards amounted to a use of prohibited, residency-based criteria, in violation of *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

The court ruled that the community-based caps did not amount to residency-based criteria, but went on to find that one of the three challenged standards was unconstitutional based on an equal protection analysis. Applying strict, or "demanding" scrutiny to the use of the community use pattern as a cap for scoring on the "alternative sources of game" factor, the court held that it was not sufficiently narrowly-tailored to meet the underlying goals.

The Board of Game recently met in emergency session to drop the questioned scoring factor for the current Tier II scoring exercise. Final judgment has not yet been issued, and no decision on appeal has yet been made. AAG Kevin Saxby defended the state in this matter.

## SUPERIOR COURT RULES IN CHALLENGE TO KASILOF FISHERY MANAGEMENT PLAN

Late in May, Superior Court Judge Brown issued an order on motions for summary judgment in *Kenai Peninsula Fisherman's Association v. Alaska Board of Fisheries*. The

case involves a challenge to the regulation adopted by the board in February, 2002 governing fishing for salmon in Cook Inlet. On one issue, a challenge to the optimal escapement goal the board adopted for the sockeye stocks, the court ruled in favor of the state. On the other issue, a challenge to the limitations on fishing time that the commissioner may allow by "emergency order," the court granted summary judgment in favor of the plaintiffs.

The ruling on the second issue has been the source of some debate because the opinion appears to rule in favor of the plaintiffs only to approve a particular interpretation of the regulation that was not disputed by the state. The state and the plaintiffs agree that the commissioner has authority to issue emergency orders that contravene the board's regulatory management plan in cases of a biological emergency or when the commissioner has significant new information that was not available to the board at the time the board adopted the regulation. The court specifically rejected the plaintiffs' argument that the regulation should be declared invalid.

The state has moved for reconsideration in hopes of clarifying the court's decision on the emergency order issue. AAGs Jon Goltz and Lance Nelson defended the state.

## HATCHER PASS LAND CONVEYANCE CHALLENGE SETTLED

On May 23, the state filed an agreement for intervention, settlement, and dismissal in *Cascadia Wildlands Project v. State, DNR*, an administrative appeal challenging a decision by the Department of Natural Resources to convey lands at Hatcher Pass to the Matanuska-Susitna Borough. The settlement, subsequently approved by Judge Sen Tan, provides for the intervention of the Mat-Su Borough as a party, for purposes of binding the borough to manage the lands in question consistently with the Hatcher Pass Management Plan, notwithstanding that the lands will no longer be state-owned. The appellant is an Oregon-based environmental group with one staff member in Alaska, but had standing by virtue of commenting on the draft DNR decision. All parties will bear their own costs, including the appellant, which had claimed public interest litigant status when requesting a waiver of the appeal bond requirement. AAG John Baker represented DNR in this appeal.

## SUPREME COURT DENIES REHEARING IN *BRIGMAN v. STATE*

On May 27, the Alaska Supreme Court denied rehearing in *Brigman v. State*, a criminal appeal in which the Court of Appeals had affirmed the appellant's conviction for participating in the unlawful taking of a brown bear in the spring 2000 permit hunt in GMU 8 (Kodiak). Brigman had challenged his conviction on multiple grounds, including that the Department of Fish and Game lacked authority to designate permit hunt areas, or subunits, and assign hunters to those subunits as permit conditions, because they were not set out in discrete regulations under the Administrative Procedure Act.

The Alaska Court of Appeals found that ADF&G lacked clear delegation of authority from the Board of Game to establish new subunits, but that the existing subunits had been validly created, and that the assignment of hunters to subunits need not be achieved by discrete regulations under the APA. A simple regulatory change can now clarify a delegation from the Board of Game to the department to adjust subunits prospectively as conditions of permit hunts. AAG John Baker assisted the Kodiak DA's office, argued the appeal before the Court of Appeals, and handled the briefing on the petition for rehearing.

## Oil, Gas, & Mining

### OIL AND GAS EXPLORATION, PRODUCTION AND PIPELINE TRANSPORTATION PROPERTY TAX APPEALS

During May, the Oil, Gas, & Mining section again worked extensively to assist the Tax Division of the Department of Revenue in resolving ten informal conference appeals from the 2003 oil and gas property tax assessments. Three appeals were taken from the ten informal conference decisions to the State Assessment Review Board, but were stayed pending department audits and resolution of related cases.

### PRODUCTION TAX REGULATIONS TO BE UPDATED

The Anchorage Oil, Gas, & Mining section is again assisting the Department of Revenue with drafting amendments to update the oil and gas Production Tax provisions in Title 15. The department intends the new regulations to be effective on January 1, 2004. AAGs Bonnie Harris and Rob Mintz have undertaken this task.

### VALDEZ'S ADMINISTRATIVE LITIGATION OF OIL AND GAS PROPERTY TAXES CONTINUES

The Oil, Gas, & Mining section continues defending the Department of Revenue against numerous appeals by the City of Valdez challenging the department's authority to implement the oil and gas property tax. Valdez has seven active appeals on a variety of taxation issues covering all tax years from 1974 through 2003. The appeals are currently consolidated into three administrative hearing processes. The Oil, Gas, & Mining section continues to file dispositive motions as appropriate. AAG Bonnie Harris is representing Revenue in this appeal.

## Torts & Workers' Compensation

### SUIT OVER LB&A AUDIT DISMISSED

An ex-DOT/PF employee sued two DOT/PF supervisors and an AAG for their part in crafting the state's responses to an investigation by the Division of Legislative Audit into his claims about the Homer Gravel Road project in 1994. Those allegations led to multiple investigations that concluded they were meritless, to the employee's termination, grievance and an arbitration (which upheld the termination), to a lawsuit against DOT/PF, won by DOT/PF (and now on appeal), and ultimately to this lawsuit. Just before trial, the plaintiff agreed to dismiss this case, with each side to bear its own costs and fees. Judge Reese was about to rule on the summary judgment motion the defendants had filed to dismiss all claims (summary judgment had already been granted in favor of the Legislative Budget and Audit defendants). AAG Venable Vermont, Jr. represented the DOT/PF personnel and the AAG.

### VOCATIONAL REHABILITATION EVALUATION CAN QUALIFY AS CIVIL RULE 35 INDEPENDENT EXAM

Is a defendant entitled to have a personal injury plaintiff undergo an interview and aptitude testing by the defendant's vocational rehabilitation specialist, as a Civil Rule 35 independent medical evaluation? Yes, according to a ruling by Ketchikan Superior Court Judge Trevor Stephens.

In a maritime case brought by a ferry worker against his employer, the plaintiff had been tested and evaluated for employability by his own rehabilitation expert. The plaintiff presented a high future loss of income claim based in part on the findings of that evaluation,

yet plaintiff's counsel refused to have his client interviewed by the state's rehabilitation expert. In ruling favorably on the state's motion to compel the examination, the court relied on federal case law and opined that the state had "good cause" for the vocational rehabilitation evaluation. AAG Tom Slagle represents the defendant, AMHS.

### ALASKA WORKERS' COMPENSATION BOARD DENIES CLAIM FOR PERMANENT TOTAL DISABILITY BENEFITS

At an earlier workers' compensation hearing, a former state employee claimed he was totally disabled by leg swelling attributed to an unwitnessed slip and fall and his general job duties as a Weigh Station Operator. The state challenged the former employee's credibility and presented evidence contradicting the demanding conditions described by the former employee. The board found the actual working conditions were consistent with the state's evidence. It ordered a medical evaluation, by its own independent expert, who was to rely solely upon the findings the board made concerning the nature of the work.

At a subsequent, recent hearing, the state argued that the board's medical expert had mistakenly based some of his conclusions on the employee's descriptions that the board previously found unreliable. Consequently, the board was asked to either have its expert reconsider those conclusions or rely upon a previous expert's conclusions that the actual work would not have caused the swelling.

In a May 30, 2003, Decision and Order the board agreed that some of its expert's conclusions were based upon the former employee's misrepresentations and were therefore unreliable. The board chose to rely instead upon the conclusions of the previous expert (that the actual job duties would not have caused the swelling) as well as its expert's opinion that some swelling was due to a worsening of the former employee's congenital condition unrelated to his work. The board therefore denied the claim for permanent total disability benefits. AAG Paul Lisankie represented the state.

### PERSONNEL NEWS

The section lost another of its attorneys to the judiciary. Former AAG Randy Olsen was appointed to superior court in Fairbanks. We will miss him in a big way, but wish him well in his new career! Having enjoyed his ability to tell an interesting and entertaining story in his pleadings as an AAG, we look forward to some good reading in his forthcoming written decisions.

## Transportation

### ALASKA SUPREME COURT RULES IN QUALITY ASPHALT PAVING DISPUTE

In 1996, Quality Asphalt Paving filed a claim against the Department of Transportation and Public Facilities (DOT/PF) for $4.5 million, alleging bad faith termination for convenience on a highway improvement project. In June, 1998, following a 12-day hearing, the hearing officer awarded Quality $1.9 million, plus prejudgment interest on this amount beginning 30 days after Quality filed its initial termination claim. The hearing officer rejected Quality's claim that the state terminated the contract in bad faith. He also rejected the state's counterclaim that Quality's recovery should be reduced by the percentage of its fault in contributing to the termination. The commissioner of DOT/PF adopted the hearing officer's recommended decision.

Quality appealed the decision to the superior court, seeking an increase of the award. The state cross-appealed primarily on the issue of the award of prejudgment interest. The state asserted that it had not waived its sovereign immunity to pay interest on administrative contract claims filed under the State

Procurement Code. The superior court upheld the hearing officer's decision in all respects except for prejudgment interest. The superior court reversed the interest component of the award, holding that the state was immune from the payment of interest on DOT/PF contract claims.

Quality appealed the superior court's decision on prejudgment interest and all other issues it had raised before the superior court. Quality also challenged whether the state had legal authority to appeal a final agency decision. The state cross-appealed on all issues it lost before the superior court.

On June 13, 2003, the Alaska Supreme Court issued an opinion upholding the superior court decision in all respects. Consequently, Quality is entitled to $1.9 million. That sum does not bear interest. The court held that Quality waived its objection to the state's cross-appeal of the final agency decision, but noted that Quality's position seemed contrary to established precedent.

The value of the court's decision for DOT/PF is diminished because interest on DOT/PF contract claims is now allowed under a new statute. However, the decision establishes that non-DOT/PF procurement code contract claims do not bear interest under AS 09.50.280. Further, DOT/PF has re-written the termination for convenience clause to clarify the costs recoverable in a termination claim and the methods allowable for arriving at costs.

The state saved approximately $1 million on prejudgment interest as a result of the supreme court's ruling because two other contract claims in the Anchorage area were settled subject to re-opening if Quality were awarded prejudgment interest. AAGs John Athens and Paul Lyle represented DOT/PF.

## Criminal Division

### ANCHORAGE

A jury convicted both William Grossman and Erick David as charged of murder in the second degree for the kicking to death of the victim. Both defendants, the victim, and all witnesses were intoxicated and homeless at the time of the murder. ADA Adrienne Bachman prosecuted this case.

A jury convicted Gerald Ross as charged of assault in the third degree for strangling the victim, a person who was engaged in cocaine trafficking. Despite the lack of jury appeal in the fact pattern and the unavailability of the victim to testify in light of her Fifth Amendment rights, ADA Adrienne Bachman was able to hold the offender accountable.

George Nelson was convicted by a jury verdict of attempted sexual assault in the second degree. The defendant carryied a woman who was unconscious due to the consumption of alcohol into some bushes in a residential area. The police intervened prior to defendant actually penetrating the victim, but after he had pulled down both his own and the victim's pants. Although the victim was unable to recall the events of the attempted sexual assault, ADA Steve Wallace was able to prevail in this case.

A jury acquitted Bryan Palmer of sexual assault in the second and third degree following a two-week trial. The victim reported to police that she was asleep, but woke when the defendant, her boyfriend's brother, sexually penetrated her. Mr. Palmer initially told the police that he could not remember what had happened, but later admitted to having sexual contact. The jury appears to have acquitted based upon its accepting the defense argument that Mr. Palmer did not

know that the victim was incapacitated and therefore did not commit a crime.

ADAs Keri Ann Brady and Mike Burke handled a nearly month-long trial of former Anchorage firefighter Stephen Grizzell and co-defendant Murville Lampkin. Correctional officers at Cook Inlet Pretrial testified that they observed Mr. Grizzell pass balloons that contained the scheduled IA controlled substance of oxycotin to Mr. Lampkin, an inmate. Mr. Grizzell's theory of defense was that the drugs were solely in the possession of Mr. Lampkin, and that he had the misfortune of visiting Mr. Lampkin at the wrong time. Mr. Lampkin defended on the theory that he thought the balloons contained only tobacco. The jury acquitted Mr. Grizzell of all charges but convicted Mr. Lampkin as charged.

## BARROW

North Slope Borough Housing Director and former Assemblyman, Delbert Rexford, was sentenced to one year in jail for a misdemeanor domestic violence assault against his wife and for bail violations.

The Barrow grand jury indicted one person for first degree vehicle theft, one person for third degree criminal mischief, one person for second degree assault, and two people for first degree sexual assault.

An HIV positive Point Lay man was indicted for 1st and 2nd degree sexual assault for raping an incapacitated woman.

## BETHEL

John Leopold was found guilty of assault in the third degree and misconduct involving weapons after a jury trial.

Robert Galindo was found not guilty of assault in the third degree and assault in the fourth degree after a jury trial.

Dawn Nayamin was found guilty of minor consuming alcohol after a jury trial.

During the month of May; one person was indicted with charges of sexual abuse of a minor in the first degree, three people for sexual abuse of a minor in the second degree, three people on first-degree sexual assault charges, two for sexual assault in the second degree, and one for third-degree sexual assault. One person was indicted with 24 counts of possession of child pornography. Four people were indicted with assault in the third degree charges. There were also people indicted with failure to stop at the direction of a peace officer, burglary in the first degree, burglary in the second degree, escape in the second degree, criminal mischief in the third degree, vehicle theft in the first degree, and vehicle theft in the second degree.

## FAIRBANKS

The Fairbanks office welcomed two legal interns for the summer: Zal Kumar from George Washington University and Jen Dreher from Indiana State University.

Felony attorney Gene Gustafson managed to secure a berth at the A-list social event of the season, fishing in Homer with U.S. Supreme Court Justice Antonin Scalia. Apparently the trip went well, and fish were caught by all.

A Harley-Davidson motorcycle took up most of the courtroom during a felony failure to stop at the direction of a peace officer trial. The defense had something to do with the driver being unable to hear the sirens or see the lights for several miles of a high speed chase. The officer's videotape showed the defendant turning around to look at the police car, and the defense witness who claimed to be parked along the highway at the time of the chase was nowhere to be seen on the video. The jury still returned a verdict on a lesser charge.

Corrine Vorenkamp secured a conviction against Jerry Mentzel for assault in the third

degree, after he deliberately aimed his car at two men on the sidewalk and almost ran them over. He had become upset at a local Burger King restaurant for not carrying a nationally-recognized special, although it was never clear what the bystanders had to do with this situation. His statement to police was that he thought they were panhandling.

Two felony cases this month resulted in mistrials due to actions by defense counsel. Both will be re-tried.

## KENAI

The Kenai office brought a case to grand jury in which the defendant was indicted for second-degree murder for a vehicle collision in which two people were killed. The defendant was alleged to be watching a video on a DVD while driving at high rates of speed and passing in a no-passing zone.

This case has already caused much debate and interest in the general public. One person came to the office to apply to volunteer because she said she felt very strongly about the issue and that she thought we did not have the resources she felt we should have to prosecute these cases and crime in general. It has also been the subject of the day for several days on the local talk radio call-in shows.

Another controversial case arose when protesters against the war were doused with water on two occasions and on a third occasion one of the demonstrators was assaulted. This month the initial one-count complaint of harassment was amended to include charges of interference with constitutional rights. The individual charged with the crime had the last incident videotaped and circulated the video on the Internet. His defense, should the judge allow it, is that he was exercising his First Amendment rights.

A confidential informant drug operation in Homer, which was started last year, culminated in the indictment of six defendants on twenty-eight felony charges and three additional defendants charged by information. The allegations range from sales of methadone, hydro and oxycodone, and methamphetamine.

## KETCHIKAN

Brock Charles was found not guilty of murder in the second degree by a Ketchikan jury. He was accused of beating to death a man in downtown Ketchikan on Christmas Eve in 2001. A friend of Charles was the only witness, but the friend had numerous theft convictions and so was impeached with these theft convictions.

Jeremiah Roberts was found not guilty of assault in the third degree but was found guilty of assault in the fourth degree for the domestic assault of his wife.

Grand jury was quiet in May with only three cases being presented. Two Ketchikan men were indicted for fourth degree misconduct involving a controlled substance for having about ten pounds of marijuana in their apartment. A Wrangell man was indicted for forgery in the second degree and theft in the second degree for stealing the checks of a man who let him stay in his cabin for free, and then forging a check for $800 and cashing it at a local store. A Craig woman was indicted for fourth-degree misconduct involving controlled substance for possession of methamaphetamine.

## KODIAK

A 62-year-old Kodiak man was convicted of misconduct involving a controlled substance in the forth degree following a two day jury trial. While being arrested on an unrelated misdemeanor, this defendant had been found to have eight bags of marijuana in his backpack, each weighing approximately one ounce, along with a digital gram scale and a portable beam scale. Although the defendant

claimed to merely be a careful consumer, the jury convicted him of possession with intent to deliver, a class C felony offense. The case before the jury was not made any worse when the defendant insisted on making his closing argument, during which he informed the jurors that if they found him guilty he would have the right to file liens against their properties and would do so. An August sentencing date is pending. The grand jury handed down a new indictment for interference with official proceedings, a class B felony offense, for the threat to the jurors. A trial date has yet to be set on the new charge.

A 35-year-old Kodiak woman was indicted for two counts of fraudulent use of an access device (credit card) after stealing her best friend's credit card and running up over $5,000 in charges on a shopping spree in Anchorage. The defendant expressed surprise when interviewed by a state trooper, saying "But I bought clothes for her (friend) too". An August trial date is pending.

A 31-year-old Anchorage woman was sentenced to 360 days in jail, with 300 suspended, and placed on probation for five years following her conviction for promoting contraband in the second degree. While incarcerated for a DUI, this defendant had kept and secreted a metal spoon after the dinner meal. When the spoon was determined to be missing at shift change, a search of this defendant's cell found that the defendant had broken the spoon in half and had hidden the handle portion in her bed linens. Although indicted for promoting contraband in the first degree, the state was unable to prove that she intended to use the broken off handle as a weapon. She was also sentenced to 70 days in jail with 60 days suspended following her conviction for DUI.

**NOME**

A Nome jury convicted Bernice Slwooko of second-degree murder in the slaying of Nome resident Jimmy Jack last fall. Ms. Slwooko had confessed to participation in the killing of Mr. Jack with an axe. Ms. Slwooko's boyfriend, and co-defendant, Jacob Anagick, had also confessed but claimed that Ms. Slwooko wasn't even there. At trial Ms. Slwooko recanted her confession and claimed that it was Anagick alone who killed Jack. Anagick, who had already entered a no contest plea to second-degree murder, also testified at trial and reiterated his claim that he had acted alone. The physical evidence corroborated Ms. Slwooko's original confession and the jury had little difficulty in finding her guilty.

After learning that her 14-year-old daughter may have had a sexual encounter with a young man from a neighboring village, a Shishmaref woman called the young man up and gave him a serious chewing out. The young man then called the troopers and confessed to a crime of which the troopers were completely unaware. A subsequent interview with the victim confirmed the defendant's admissions and Alfred Ballot has been charged with sexual abuse of a minor in the second degree.

Several new marijuana cases, all very similar, were referred. In all the cases, either postal authorities or airline personnel report to the police that incoming packages looked suspicious. Controlled deliveries were done and drugs and admissions obtained. Timothy Brown and Nancy Huls were indicted for misconduct invloving a controlled substance in the fourth degree in two of these cases; two others are pending grand jury action. Stanton Paniptchuk was indicted in a felony case, DUI, from Unalakleet. He has a prior felony DUI so he's looking at a presumptive sentence.

## OSPA
(Office of Special Prosecutions & Appeals)

### Statute and Rule Interpretations

The crime of possession of burglary tools. The court of appeals interpreted AS 11.46.315 as not criminalizing the possession of ordinary tools that have not been adapted or designed for use in a burglary. This was consistent with the legislative history of the statute. *Morton v. State*, Op. No. 1872 (Alaska App., May 2, 2003).